ISSUE 754 | November 13, 2020

FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

FDA Issues Guidance on Sesame Labeling

The U.S. Food and Drug Administration (FDA) has issued draft guidance "encouraging food manufacturers to voluntarily declare sesame in the ingredient list on food labels." The guidance notes that "sesame can, in some circumstances (such as when ground and used in a spice blend), be declared in an ingredient statement as simply 'spice' or 'flavor,' so its presence may not be obvious to consumers." While FDA has not required sesame to be labeled, "we recommend that manufacturers, as a voluntary matter, clearly declare sesame in the ingredient list when it is used in foods as a 'flavor' or 'spice' in a parenthetical following the spice or flavor, such as 'spice (sesame),' 'spices (including sesame),' 'flavor (sesame),' or 'flavors (including sesame).' If a term is used for a food that is or contains sesame, such as tahini, we recommend that sesame be included in a parenthesis, e.g. 'tahini (sesame)' in the ingredient list. This voluntary declaration of all sources of sesame in the ingredient list will help consumers, especially those allergic to sesame, avoid foods that could cause an allergic reaction." Comments on the draft guidance will be accepted until January 11, 2021.

New York Proposes Cannabinoid Regulations

The New York State Department of Health released proposed regulations that would govern cannabinoid hemp products. The regulations would establish licensing for cannabinoid hemp extractors, manufacturers and retailers and set limits on products

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permitted to be sold at retail. Food products would be limited at 25 mg of cannabinoids, and all cannabinoid hemp products would be required to bear labels listing the amount of cannabinoids in the product.

"These regulations are the next step toward regulating the growing hemp industry in New York in a way that protects consumers and helps ensure the industry's long-term viability," said Governor Andrew Cuomo in a press release.

LITIGATION

FDA Sues Juice Supplier, Alleging Insanitary Conditions

The U.S. Food and Drug Administration (FDA) has filed a lawsuit seeking to enjoin Valley Processing Inc. from introducing adulterated food into interstate commerce. *USA v. Valley Processing Inc.*, No. 20-3191 (E.D. Wa., filed November 6, 2020). FDA alleges Valley Processing's juice products "have been found to contain inorganic arsenic and patulin, both toxins which pose a health risk to consumers." The products were supplied to the U.S. Department of Agriculture's school lunch program, "providing approximately 2,964,000 apple juice servings to schoolchildren every year."

FDA allegedly found "grossly insanitary conditions" during inspections in 2016, 2017, 2018 and 2019, including barrels containing "grape juice concentrate that was several years old" and "contaminated by filth and mold, thus not suitable for human consumption."

Investigators "also discovered that Defendants processed the 'bottoms' of stored grape juice concentrate. The 'bottom' of juice concentrate is the leftover sludge that accumulates at the bottom of the barrel, after Defendants open a barrel to pull product off the top, exposing all of the product in the barrel to possible contamination. Defendants diluted the 'bottoms,' likely to contain contaminants, to be blended with newer juice. Defendants mixed the juice concentrate from both the ambient barrels and the 'bottoms' with newer lots to hide the contamination."

"Defendants have received ample notice that their juice processing operations violate the law and that continued violations could lead to regulatory action," the complaint argues. "In response to the inspections, Warning Letter, and regulatory meeting, the Defendants repeatedly promised, both orally and in

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ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility

numerous letters to FDA, to bring their facility into compliance with regulatory requirements. Specifically, Defendants promised to suspend their violative practices of holding juice products outside and blending older juice product that had been subject to possible contamination with newer juice products, and to adequately implement their [Hazard Analysis Critical Control Point] plans. The most recent FDA inspection showed that Defendants kept none of these promises. Although Defendants claimed to be interested in making necessary changes, compliance with the law has clearly not been a priority."

inspections, subject to FDA, USDA and FTC regulation.

Massachusetts Court Dismisses Ginger Ale Claims

A Massachusetts federal court has dismissed allegations against Polar Corp. asserting the company's ginger ale products contain a "miniscule amount" of ginger that "provides none of the health benefits consumers associate with real ginger." *Fitzgerald v. Polar Corp.*, No. 20-10877 (D. Mass., entered November 10, 2020). The court noted that the complaint "appears to have been imperfectly copied from a nearly identical case brought in the Northern District of California involving Canada Dry ginger ale."

The court was unpersuaded that Polar Corp. misrepresented that the ginger ale contained ginger, finding that ginger was indeed an ingredient. "[N]o reasonable consumer could rely on a claim of 'real ginger' in a soft drink as a representation that the drink contains chunks of 'ginger root' as opposed to a ginger taste," the court found, dismissing the plaintiff's allegations that rested on the existence of false statements.

Court Certifies Class of Breadcrumbs Buyers Challenging PHO Content

A California federal court has granted class certification to consumers who purchased Kroger Co. breadcrumbs relying on a front-label representation stating the product contained "0g Trans Fat" despite the product's partially hydrogenated oil (PHO) content. *Hawkins v. Kroger Co.*, No. 15-2320 (S.D. Cal., entered November 9, 2020). The court found that the class met all requirements for certification and granted the plaintiff's motion, certifying a class of "All citizens of California who purchased, between January 1, 2010 and December 31, 2015, Kroger Bread Crumb containing partially hydrogenated oil and the front label claim '0g Trans Fat.'"

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